No. 95-2074

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,
Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO, AND UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF PETITIONER

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26 pp

CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF *AMICUS* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 5
I. THE ISSUE WHETHER THE RELIGIOUS FREEDOM RESTORATION ACT IS TRIGGERED BY THE CITY'S ACTION SHOULD BE RESOLVED BEFORE ADDRESSING THE ACT'S CONSTITUTIONALITY 8
II. THE CITY'S DENIAL OF A DEMOLITION PERMIT IS NOT A "SUBSTANTIAL BURDEN" ON THE FREE EXERCISE OF RELIGION 11
A. RFRA Does Not Apply Where Governmental Action Does Not Substantially Burden Religious Conduct 11
B. The City's Denial Of A Demolition Permit For The Church Is Not A "Substantial Burden" On Religious Conduct 13
CONCLUSION 20

TABLE OF AUTHORITIES

Cases	Page
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	8, 9
Braunfeld v. Brown, 366 U.S. 599 (1960)	19, 20
Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990)	*passim*
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)	9
Hernandez v. Commissioner, 490 U.S. 680 (1989)	17, 18
Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990)	17, 18
Lakewood, Oh. Cong. of Jehovah's Witnesses, Inc. v. Lakewood, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983)	19-20
Leatherman v. Parrant Cty. Narcotics Intel. and Coord. Unit, 507 U.S. 163 (1993)	13-14
Liverpool, N.Y. and Phila. Steamship Co. v. Commissioners of Emigration, 113 U.S. 33 (1885)	9-10
Loper v. Beto, 405 U.S. 473 (1972)	8-9
McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991)	13
Morisette v. United States, 342 U.S. 246 (1952)	13

Page

Rectors, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 449 U.S. 905 (1991) 18, 19
Sherbert v. Verner, 374 U.S. 398 (1963) . . . *passim*
Spector Motor Serv. v. McLaughlin, 323 U.S. 101 (1945) 8
Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) 13, 16
United States v. Campos-Serrano, 404 U.S. 293 (1971) 9
Vance v. Terrazas, 444 U.S. 252 (1980) . . . 9
Wisconsin v. Yoder, 406 U.S. 205 (1972) . *passim*

Statutes

U.S. Const., amend. I 3
Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (1994) . . . . . *passim*
16 U.S.C. § 461 (1994) 1
16 U.S.C. § 468 (1994) 1

Other Authorities

139 Cong. Rec. H8714 (daily ed. Nov. 3, 1993) 12
139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) 11-12
H.R. Rep. No. 103-88 (1993) 11

Page

S. Rep. No. 103-111 (1993) 15
City of Boerne Ordinance No. 91-05 (June 25, 1991) 5-6

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BRIEF *AMICUS CURIAE* OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS*

The National Trust for Historic Preservation in the United States is a private, nonprofit organization chartered by Congress in 1949 to promote public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 16 U.S.C. §§ 461, 468. With the support of its 265,000 members, including more than 12,500 in Texas, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust has seven regional and field offices around

the country, including one in Fort Worth, Texas.

The National Trust's expertise in historic preservation law is unparalleled; the Trust has participated in more than one hundred historic preservation cases during the past twenty-five years, including ten federal and state court cases involving the application of the First Amendment to historic religious properties. In this capacity, the National Trust is aware of a number of cases around the country in which local historic preservation ordinances have been challenged under the Religious Freedom Restoration Act.

The National Trust also contributes financial and technical assistance for the preservation of historic religious properties. This support includes providing loans and grants, conducting workshops and training programs on financial planning and property management for religious institutions, and serving as a clearinghouse for information on religious property conservation.

SUMMARY OF ARGUMENT

Petitioner, the City of Boerne, Texas ("City") has enacted an ordinance providing for the preservation of the City's architectural legacy, and regulating the circumstances under which historic structures within the City may be demolished or modified. Pursuant to that ordinance, the City denied the application of Respondent, P.F. Flores, the Archbishop of San Antonio ("Archbishop"), to demolish and reconstruct St. Peter Catholic Church ("Church"), a seventy-three-year-old historic structure located in the City's historic district. According to the Archbishop's allegations, unless the Church is demolished and reconstructed to his specifications, some parishioners may be prevented from attending Mass at the Church. The Archbishop filed this lawsuit, challenging the City's right to deny the demolition

permit, pursuant to the Religious Freedom Restoration Act ("RFRA" or "the Act"), 42 U.S.C. § 2000bb *et seq.* (1994), as well as a number of other constitutional challenges.

Congress passed RFRA in 1993 to protect the "free exercise [of religion,]" U.S. Const., amend. I, while ensuring that the everyday operations of government are not subject to strict scrutiny when they incidentally burden religious conduct. The Act was intended as a legislative response to *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), in which this Court found that neutral laws of general applicability did not prohibit the free exercise of religion under the First Amendment and therefore did not require any "compelling justification" by the government. *See* 42 U.S.C. § 2000bb(a)(4) (characterizing *Smith* as "virtually eliminat[ing] the requirement that government justify burdens on religious exercise"). RFRA expressly "restore[s]" Congress's understanding of this Court's pre-*Smith* free exercise jurisprudence, which required the government to offer a "compelling justification" in the event that governmental action imposed a "substantial burden" on religious activity. *See id.* § 2000bb(b)(1) (*citing Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

The Archbishop's RFRA claim was addressed prematurely in the courts below. The District Court found the Act unconstitutional; the Court of Appeals reversed. But neither court addressed the threshold question whether RFRA's protections are even triggered by the City's actions. The National Trust, as *amicus curiae*, urges this Court to recognize the priority of the statutory issue and either (1) vacate the opinions of the Court of Appeals and the District Court and affirm the judgment of the District Court on

different grounds, namely, that the City's actions do not trigger RFRA's "compelling interest" test, or (2) vacate the opinions of the Court of Appeals and the District Court and remand to the District Court for threshold factual determinations.

Recognizing the role of the judiciary in our constitutional system, courts will ordinarily decline to reach a constitutional issue if an antecedent, nonconstitutional basis for decision is available. This prudential rule applies irrespective of the stage of litigation or (for purposes of this Court) the issue formally contained in the petition for writ of certiorari. Thus, although neither the trial court nor the appellate court below paused to determine whether the City's action actually triggered strict scrutiny under RFRA, this Court itself should either do so now, or remand this matter to the District Court for such a determination.

RFRA applies only when government action constitutes a "substantial[] burden" on the exercise of religion. 42 U.S.C. § 2000bb-1(a). Both the Act and its legislative history direct the courts to the free exercise jurisprudence predating *Smith* for purposes of defining all terms, including the term "substantial burden." 42 U.S.C. § 2000bb(b)(1).

Under this Court's pre-*Smith* free exercise jurisprudence, governmental action imposes a "substantial" burden on religion only when it punishes religiously prescribed conduct or coerces religiously proscribed conduct. In these cases, the penalty or coercion operated on adherents individually, essentially forcing them to choose between obeying their religious precepts or facing criminal sanctions or other penalties. None of the Archbishop's allegations rise to this level. The City's denial of the Archbishop's demolition permit does not penalize any religiously motivated activity. Moreover, even if the Court assumes as

true the Archbishop's allegations that some Church members may be unable to attend Mass at the Church occasionally, that does not have the effect of penalizing or coercing individual members.

In contrast, where governmental action has marginally affected the overall level of religious activity, this Court has found the burden upon the exercise of religion to be insubstantial. For example, neutral laws making religious activity more expensive or inconvenient, or having the effect of reducing the number of adherents able to participate in religious activity, impose only incidental burdens. That is precisely the nature of the burden involved here. No individual member of the Church is being denied the ability to worship, no parishioner is subject to any penalty for worshipping as he or she wishes, and no one is being coerced in any way owing to his or her religious practices. At most, the City's action has affected the overall level of religious activity at the Church. But this incremental affect is not a "substantial burden" within the meaning of this Court's pre-*Smith* free exercise jurisprudence.

ARGUMENT

The City's effort to preserve its architectural legacy, which includes the 1923 St. Peter Catholic Church, was challenged below as a substantial burden on the exercise of religion.[1] In 1985, the City enacted a local historic preservation ordinance, which was amended in 1989 and 1991, to ensure the preservation of "structures having significant historical value which reflect the heritage of the

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[1]For purposes of this summary, the National Trust has relied on the Second Amended Complaint (cited as "Compl."), and a joint stipulation of the parties (styled Exhibit 5-PTO, Stipulated Facts, and cited as "Stip.").

City, the State [of Texas], and its people." City of Boerne Ordinance No. 91-05 at 1 (June 25, 1991) ("Ordinance"). Until October 1994, the boundary of the historic district created pursuant to the Ordinance bisected the Church. Compl., ¶ 11; *see generally* Ordinance, § 6 (providing for the creation of the historic district).[2]

In 1993, the Archbishop sought permission from the Landmark Commission to demolish most of the Church and to build a larger structure in its place. The demolition and reconstruction of the Church is intended to enlarge the building to accommodate more worshippers. Compl., ¶¶ 9, 13.

After reviewing the Archbishop's proposals for demolition and renovation, the City's Landmark Commission denied -- pending "changes to the permit application" -- the Archbishop's application in February 1994, because the demolition would "adversely affect the historic district" and would be "inconsistent with the spirit and purposes" of the Ordinance. Stip., ¶ v. The Archbishop's appeal of the Landmark Commission's decision to the City Council was also denied. *Id.*, ¶ y. The Archbishop does not appear to contend that the City did not follow its established procedures in reviewing the applications. *See generally* Ordinance, § 7.1.1 (setting out criteria for reviewing demolition and reconstruction applications).

Following denial of the Archbishop's application and appeal, the Landmark Commission offered to "work with" the Archbishop to facilitate construction of a new structure in the historic district, and the parties met to consider

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[2]Since October 1994, the entire Church has been within the boundaries of the historic district.

alternative designs and locations. Stip., ¶¶ bb, mm. Indeed, the City Council even enacted a nonbinding resolution in January 1995 endorsing the closure of a portion of an adjacent street to "facilitate the construction of a new church building, without destruction of the 1923 church structure." *Id.*, ¶ ii.

In spite of these efforts to reach an accommodation, the Archbishop filed the present lawsuit in May 1994. The Archbishop alleges, among other things, that the City's denial of the demolition application "imposes a significant burden on the free exercise of religion" and that the City's decision is a violation of RFRA. Compl., ¶ 29.

Although the Archbishop appears to contend that any alternative to the proposed demolition will inevitably prevent some members of the Church from attending Mass at St. Peter on occasion, *see id.*, ¶¶ 25, 29, the Archbishop also appears to concede that the interests of the Church and the City can both be accommodated, albeit by a more expensive renovation. *See, e.g., id.*, ¶ 23 ("An alternative design that recognizes the constraints of the terrain and pays due regard to the liturgical aspects of the Church would cost substantially more than the proposals already submitted"); *see also* ¶¶ 19, 27. Moreover, the courts below paid no attention to a variety of alternatives for accommodating the interests of all parties, including the holding of additional Masses, or the use of additional, existing sites.

The District Court ordered briefing on the constitutionality of RFRA and decided that RFRA was unconstitutional without finding any facts or making any determination as to whether the provisions of RFRA were triggered by the City's actions here. *Flores v. City of Boerne*, No. SA-94-CA-0421 (W.D. Tex. March 15, 1995) (Bunton, J.), *reprinted at* Petition For A Writ Of Certiorari,

Appendix B. On interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), the United States Court of Appeals for the Fifth Circuit reversed, again without expressly determining whether RFRA was applicable. *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996). This Court then granted a writ of certiorari.

I. THE ISSUE WHETHER THE RELIGIOUS FREEDOM RESTORATION ACT IS TRIGGERED BY THE CITY'S ACTION SHOULD BE RESOLVED BEFORE ADDRESSING THE ACT'S CONSTITUTIONALITY.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the Court] ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Servs. v. McLaughlin*, 323 U.S. 101, 105 (1945); *see generally Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-47 (1936) (Brandeis, J., concurring). This doctrine requires that, prior to declaring RFRA unconstitutional, a court should determine whether the Act is properly invoked by the litigant seeking the law's protection.

This prudential rule applies to all cases at all stages of litigation, including cases ostensibly presenting only constitutional issues. Accordingly, this Court has not hesitated to look beyond any formally presented constitutional issue for nonconstitutional grounds for decision when these principles would be served. As then-Justice Rehnquist explained in *Loper v. Beto*:

> It is true that our grant of certiorari in this case was limited to the [constitutional] question that is decided by the plurality in today's opinion. But the limited nature of the grant is not an advance

> guarantee that after reading briefs and hearing oral argument, we will be satisfied that the question is properly presented to us. Our duty to avoid constitutional adjudication when narrower grounds of decision are possible is clearly established by such authority as *Ashwander* . . . and *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947).

405 U.S. 473, 502 (1972) (Rehnquist, J., dissenting).[3]

Earlier in the same term, this Court granted certiorari in *United States v. Campos-Serrano* on a constitutional issue (involving the Sixth Amendment) and a statutory one (involving immigration laws). 404 U.S. 293, 302 n.1 (1971) (Blackmun, J., dissenting) (setting out questions in certiorari petition). Following briefing, however, this Court, citing *Ashwander*, decided the case on an entirely different statutory ground that dispensed with the need to reach the constitutional issue. *Id.* at 295.[4] *Cf. Liverpool, N.Y. and*

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[3]The fact that this statutory issue has not been raised by the parties should not prevent the Court from considering it. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-37 (1991) (Stevens, J., dissenting) (Court may reach issue raised for the first time in *amicus* briefs); *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980) ("consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them") (citations omitted).

[4]In *Campos-Serrano*, the Court observed in passing that the ground on which it ultimately decided the case had been before the lower court. 404 U.S. at 296 n.4. The same is true here: the National Trust argued in the Fifth Circuit that unresolved statutory

Phila. Steamship Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885) (declining to address constitutional issue decided below; remanding for determination of statutory issues).

Addressing the constitutionality of RFRA is a wholly unnecessary exercise here. RFRA only applies where a government's action "substantially burdens" religious conduct within the meaning of this Court's free exercise cases prior to *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(b)(1). But those cases counsel serious reservations about the applicability of RFRA here: even if all of the Archbishop's allegations in the record are taken as true, preservation of the Church is simply not a "substantial burden" on the practice of religion by the Church's members.

Consistent with the prudential rule against deciding constitutional issues unnecessarily, the National Trust urges resolution of the antecedent statutory issue, namely, the applicability of RFRA. As explained *infra,* the City's actions do not constitute a "substantial burden" on the exercise of religion by the Church's members and thus do not trigger the "compelling interest" showing required by RFRA. Accordingly, this Court should either (1) vacate the opinions of the Fifth Circuit and the District Court and affirm the dismissal of the Archbishop's RFRA claim on different grounds or (2) in the event the Court believes that the record of the Archbishop's allegations does not afford an

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issues were precedent to the Archbishop's constitutional claim. *See* Brief *Amicus Curiae* Of The National Trust For Historic Preservation at 3, *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996). *See also* Brief Of The United States In Opposition at 10-11.

adequate basis for dismissal, vacate and remand to the District Court for factual findings on RFRA's requirements.

II. THE CITY'S DENIAL OF A DEMOLITION PERMIT IS NOT A "SUBSTANTIAL BURDEN" ON THE FREE EXERCISE OF RELIGION.

A. RFRA Does Not Apply Where Governmental Action Does Not Substantially Burden Religious Conduct.

While RFRA is intended to prevent government from substantially burdening religious exercise without compelling justification, it is not intended to exempt from all secular authority anything and everything remotely connected to religion. Rather, the Act ensures religious freedom while explicitly recognizing, through its "substantial burden" requirement, that incidental burdens on religion inevitably arise in a democratic system of laws, and that governments cannot and need not prove "compelling" justifications for those merely incidental burdens.

Congress did not adopt the "substantial burden" threshold by accident. Indeed, the original version of RFRA in the House of Representatives covered *all* "burdens" on religion. *See* H.R. Rep. No. 103-88 at 10 (1993). So sweeping an act would, of course, have had profoundly debilitating effects at every level of government in the United States. Accordingly, the Senate purposefully amended the House version to address only "substantial" burdens, as Senator Hatch explained:

> [T]he amendment . . . is intended to clarify [that] the compelling interest required by the Religious Freedom Act applies only where there is a *substantial burden* placed on the individual free exercise of religion.

> This is consistent with the case law developed by the Court prior to the Smith decision . . . .
>
> [The Act] does not require the Government to justify every action that has some effect on religious exercise. Only action that places a substantial burden on the exercise of religion must meet the compelling State interest set forth in the Religious Freedom Restoration Act.

139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (remarks of Sen. Hatch) (emphasis supplied); *see also id.* (remarks of Sen. Kennedy) ("The act would not require [a compelling interest] justification for every governmental actions [sic] that have an incidental effect on religious institutions."). The House accepted the Senate amendment, and specifically noted: "This amendment is consistent with the intent of the bill, and prior case law, which does not protect persons against State actions which have only an *incidental* burden on their religious exercise." 139 Cong. Rec. H8714 (daily ed. Nov. 3, 1993) (remarks of Rep. Brooks) (emphasis supplied).

Congress's intention to codify this Court's pre-*Smith* threshold test requiring demonstration of a "substantial burden" is contained in the statute itself: "The purposes of this [Act] are (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is *substantially* burdened." 42 U.S.C. § 2000bb(b) (emphasis supplied).

This express legislative intention is consistent with the Court's own rule that, when the legislature borrows a judicial term of art, the legislature intended it to have its

established meaning. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *see Morisette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached [thereto]"). Thus, if the federal courts would not find a violation of the free exercise clause under pre-*Smith* jurisprudence, then they would not find a violation of RFRA.

B. The City's Denial Of A Demolition Permit For The Church Is Not A "Substantial Burden" On Religious Conduct.

Using the pre-*Smith* test required by RFRA, this Court has rarely found a burden on religious conduct unconstitutional. Frequently, the Court has found that government action imposes only an insubstantial burden on free exercise. *See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-05 (1985) (requirements of Fair Labor Standards Act as applied to religious group do not require compelling justification). Applying those cases to the Archbishop's allegations demonstrates that the Archbishop's RFRA claim should be dismissed.

The Archbishop has explained the burden on religious activity involved here largely in terms of the ability of parishioners to attend Sunday Mass. Compl., ¶¶ 25, 29.[5]

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[5]For purposes of addressing the Archbishop's allegation that the City's action "substantially burdens" religion, the National Trust has taken as true the allegations in the Second Amended Complaint because the Archbishop's RFRA claim was disposed of on the pleadings. *See Leatherman v. Parrant Cty. Narcotics Intel. and Coord. Unit*, 507 U.S. 163, 164 (1993) (on motion to

Essentially, the Archbishop contends that the Church must be demolished and rebuilt in precisely the way he wishes; any alternative entails either excluding some members of the church from Mass or spending additional Church funds. *Id.*, ¶¶ 23, 27, 29. Even if taken as true, this view of the facts does not describe a "substantial burden" on religious conduct, and therefore does not implicate RFRA in this case.

Government imposes a "substantial" burden on religious conduct when it punishes religiously prescribed conduct or coerces religiously proscribed conduct, whether through the criminal laws or through withholding of otherwise available government benefits. In *Wisconsin v. Yoder*, which RFRA explicitly invokes, *see* 42 U.S.C. § 2000bb(b)(1), this Court examined Wisconsin's compulsory attendance law, which subjected the parents of nonattending children to criminal sanctions. The Old Order Amish challenged the law on the ground that forced high school attendance jeopardized their religious observance. After calibrating the "worldly influence" of the modern public high school on the traditionalist precepts of the Old Order Amish, this Court agreed: "secondary schooling . . . contravenes the basic religious tenets and practices of the Amish faith," and indeed, constitutes "a very real threat of undermining the Amish community and religious practice." 406 U.S. at 218. Because the law effectively punished the religionist for practicing religion, the burden was substantial.

Both before and after deciding *Yoder*, this Court has taken a similarly strict view of the "substantial burden" requirement. In *Sherbert v. Verner*, for example, South Carolina denied unemployment benefits to a Seventh-Day

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dismiss, all factual allegations in the complaint are assumed to be true).

Adventist because she refused to work on her Sabbath. This Court wrote: "[the] imposition of such a choice puts the same kind of burden upon free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 404.

Finally, the facts of *Smith* itself provide a textbook example of a case in the *Yoder* line. There, the burden could hardly have been greater: Oregon's unquestionably neutral law prohibiting peyote criminalized a sacrament of the Native American Church. *Smith*, 494 U.S. at 874. Accordingly, Justice O'Connor (applying the pre-*Smith* test codified by RFRA)[6] found Oregon's peyote laws sustainable only on a showing of compelling interest, and found that Oregon had a "compelling interest" in prohibiting possession of peyote. *Id.* at 903-06 (O'Connor, J., concurring).

In all of these cases, the government confronted the adherent with an intolerable dilemma: abandon your religious practice or be punished. This was so whether the law provided criminal penalties for religious conduct (*Yoder*, *Smith*), or exclusion from universally available subsistence programs, which was the equivalent of a criminal penalty (*Sherbert*). In addition, the burdens deemed "substantial" by the Court operated on every adherent individually. Before *Yoder*, every Old Order Amish parent was subject to criminal penalties for her child's inattendance. Before *Sherbert*, every Seventh-Day Adventist who refused to work on Saturday was denied unemployment benefits. And in Oregon, every Native American Church adherent was barred

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[6]Both Congressional reports quoted extensively and approvingly from the concurrence in *Smith*, in which Justice O'Connor applied the traditional "substantial burden" analysis. *See, e.g.*, S. Rep. No. 103-111 at 1896 (1993).

from engaging in his church's sacraments. The government action burdened the religious conduct of each and every adherent within the law's purview, and accordingly, the Court found the burden to be "substantial."

This universe of "substantial burdens" on religion does not encompass the Archbishop's allegations. The City's denial of the demolition permit does not punish the practice of religion, or coerce its rejection, or operate on any religionist individually. The City has denied the Archbishop the right to demolish an historic church for reasons having nothing to do with religious conduct.[7] And indeed, some Church members may thereby be unable to attend Mass on occasion. But the Archbishop cannot show that this would result from a penalty on attending, or from a need to forego Mass to receive a vital government benefit. At bottom, the City's action does not penalize -- directly, indirectly, or any other way -- the practice of religion, and so is a far cry from the burdens on religious conduct found in *Yoder*, *Sherbert*, and similar cases.

Where, in contrast, government has only marginally affected the overall level of religious activity, this Court has

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[7]All religious institutions engage in essentially secular activity, such as managing their records or their property in compliance with the law, in furtherance of their religious mission; moreover, these secular activities necessarily have religious overtones. But such compliance is not therefore a "substantial burden" on free exercise. *See, e.g., Tony & Susan Alamo Found.*, 471 U.S. 290 (even though compliance with mandates of the Fair Labor Practices Act violated adherents' religious beliefs, the Court found no "substantial burden" on free exercise). Accordingly, the City's preservation laws as applied to Church property do not impose a "substantial burden" merely because management of the property has religious implications.

found the burden on free exercise to be insubstantial. In *Jimmy Swaggart Ministries v. Board of Equalization*, the Court reviewed the burden that California's Sales and Use Tax imposed on the Ministries' activities, which included the purveyance of the instruments of worship -- Bibles, Bible study manuals, tapes of sermons, and religious music. The tax did not criminalize any religious conduct, but it had the necessary effect of "decreas[ing] the amount of money appellant ha[d] to spend on its religious activities." 493 U.S. 378, 391 (1990). Less money meant, inevitably, fewer "evangelistic crusades [and] missionary endeavors," *id.* at 381-82; in other words, fewer adherents participating in the religious activity of the Ministries.

The Ministries could, of course, have elected to raise prices to recover any revenue lost to the tax. But the effect, for First Amendment purposes, would have been exactly the same: fewer adherents would have been able to afford Bibles and other religious publications and materials, and accordingly, fewer would have been able to engage in religious activities. Thus, without specifically prohibiting any individual adherent from engaging in religious conduct, California's tax had the effect of diminishing the total amount of observance within a religious community. *See also Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (neutral tax law that diminishes adherents' ability to engage in religious activity does not impose a substantial burden).

The City's limitations on the demolition of buildings within the historic district impose an incidental burden on the Church no greater than those identified in *Swaggart* and *Hernandez*. Essentially, the Archbishop's position is that demolition and reconstruction of the Church will maximize the opportunities for the Church members to worship. But there is nothing in pre-*Smith* free exercise jurisprudence that

imposes an obligation on the City to assist in this project. And even if, on any given Sunday, fewer worshippers may attend Mass in the existing Church than in a larger building, that is precisely the type of concern with the overall level of religious activity that *Swaggart* and *Hernandez* rejected.

In *Hernandez*, Scientologists who were required by their religion to pay for "auditing" sessions were denied a tax deduction for the sessions. This Court's upholding of the denial inevitably diminished religious activity in two ways: first, by making worship more expensive for all adherents, and second, by making some religious activity impossible for those adherents who simply could not, without the deduction, afford the sessions. Similarly, the City's decision here could require those who wish to attend Mass at the Church to arrive earlier, and could also mean that some members may be unable to attend Mass at this Church. Under this Court's decisions prior to *Smith*, however, that is not a substantial burden on free exercise.[8]

In *Rectors, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 449 U.S. 905 (1991), the U.S. Court of Appeals for the Second Circuit applied *Swaggart* and *Hernandez* to a dispute similar to the one before this Court. St. Bartholomew's Church owned a Community House in which the Church conducted many of its religious and community outreach activities. New York's Landmarks Preservation Commission denied the Church's request to level the historic Community House and replace it with an

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[8]The inability of a Scientologist to pay for "auditing" sessions, *see Hernandez*, 490 U.S. at 699, is weighed, in the First Amendment balance, no differently than the inability of a Catholic to attend a Mass of her choosing.

office tower, which would both house the Church's religious activities and significantly enhance the Church's revenues through commercial rents. *St. Bartholomew's*, 914 F.2d at 352, 355.

Citing *Swaggart* and *Hernandez*, the Second Circuit found that whether the Church's religious activity was "substantially burdened" by New York's action turned on whether the Church "ha[d] been denied the ability to practice [its] religion or coerced in the nature of those practices." *Id.* at 355. The Second Circuit found that New York's action, like the City's in this case, did not punish any religious activity. In each case, religious activity may have been rendered more expensive or less convenient, but that, again, is an incidental burden not requiring a compelling justification.

The Archbishop has alleged that the effect of the City's action may deprive some members of the church of the ability to attend Mass on occasion. But the Archbishop has also suggested that the Church's interests and the City's Ordinance can both be accommodated, merely by using an alternative -- although more expensive -- design. *See* Compl., ¶¶ 19, 23, 27. Moreover, the interests of all parties may be served by the holding of additional services, either at the Church or at alternative venues.

If, as these alternatives suggest, the issue here is merely one of expense, then the Archbishop's case for a "substantial burden" is slender indeed. Where the law "operates so as to make the practice of . . . religious beliefs more expensive," no compelling justification is required. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1960) (upholding Sunday closing laws despite free exercise claims by Orthodox Jews). This version of the Archbishop's argument was properly analyzed by the Sixth Circuit in *Lakewood*,

Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983). There, the congregation contested the city's comprehensive zoning plan because it barred construction of a house of worship on land owned by the Congregation; the permissible sites were all "more expensive." *Id.* at 307. The Sixth Circuit, citing *Braunfeld*, found government action that raised the cost of engaging in religious activity, including the cost of constructing a house of worship, is not a "substantial" burden within the meaning of this Court's free exercise jurisprudence. *Id.* at 307-08. If this greater expense (as opposed to the potential exclusion of Church members from Mass) is, in fact, the burden involved here, there is no question that the City's actions do not trigger the "compelling interest" requirement of RFRA.

CONCLUSION

For the foregoing reasons, the National Trust urges this Court to vacate the opinions of the Court of Appeals and the District Court and affirm the judgment of the District Court on statutory grounds, or, in the alternative, to vacate the opinions of the Court of Appeals and the District Court and remand to the District Court for findings of fact on the applicability of the Religious Freedom Restoration Act.

Respectfully submitted,

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